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President W. P. Rogers of the Association of American Law Schools in his presidential address made an earnest plea for an increase in entrance requirements in all law schools and urged the adoption of the requirement of a course of two years' preliminary study in a standard college or university by all candidates for a degree of LL.B.

The most striking paper read before the law school association was one by Professor A. M. Kales, of Northwestern University, in which he maintained that the case books now generally in use have become seriously defective in not going far enough in equipping students for actual practice at the bar in the older jurisdictions, such as New York, Pennsylvania and Massachusetts, in that the present case book seeks to set forth the ideal law, drawn from those cases in England and in various states, which, in the opinion of the editor are most nearly what the law should be; and that therefore they do not teach the law as it exists in those jurisdictions having a settled jurisprudence of their own. It was pointed out in answer to Professor Kales's paper, that the aim of a law school should be training quite as much as the imparting of information, and that a thorough study of the best obtainable body of law was the best preparation for the practice of law in any state, and furthermore that the adoption of state case books would tend most unfortunately to such a divergence in the growth of law in the different jurisdictions as to make the already chaotic conditions unendurable.

H. M. B.

NOTICE TO CORPORATION, CLEAN HANDS, AND TRADE SECRETS.—In the case of *The Vulcan Detinning Co.* v. *The American Can Co.*, decided July 2, 1907, by the New Jersey Court of Errors and Appeals, 67 Atl. Rep. 339, some very interesting questions relating to the use of trade secrets surreptitiously acquired from one who had not a valid title, were discussed and determined.

As early as 1891 a process for detinning scrap tin had been discovered and put into successful operation by one Goldschmidt, of Essen, Germany. A large part of the tin scrap used by the German factory was furnished by a company in New York, of which Mr. Kern was the head. He purchased from various manufacturers using tin in this country, among whom was a Mr. Assman. Mr. Kern and Mr. Assman, and other persons engaged in similar business in this country, for a considerable time, made an effort to organize a company to engage in the detinning business in this country, and correspondence was had with Mr. Goldschmidt for the purpose of acquiring the right to use his process. Mr. Goldschmidt, however, in 1897, definitely declined to sell his process to those who sought to obtain it. In the preliminary correspondence he had stated to Mr. Kern in 1896 that his process was then being used at Flushing, Holland, by a company called The Tinfabriek Co., which had obtained the process clandestinely through one Laernoes, its representative, by enticing one Zeyen, a trusted employe at the Essen factory, to betray his master by furnishing full details of the secret process. In 1898 the parties in this country made a further effort to organize a company for building and operating a detinning plant, providing the process could be

obtained from either of these foreign parties. None of the American parties, except Mr. Kern, knew how the Tinfabriek Co. had obtained the process. The matter was entrusted to Mr. Kern, who visited Mr. Goldschmidt, at Essen, and made a final endeavor to secure the process from him and to enlist him in the venture, but without success. He then went directly to Flushing, and obtained an option from the Tinfabriek Co. Upon his return to New York, the Vulcan Metal Refining Co. was organized, and the option obtained from the Tinfabriek Co. was turned over to it, it paying therefor, in cash and stock, nearly $200,000, and Laernoes and Zeyen were both engaged to install the process. Another company, the Vulcan Western Co., was organized a little later by the same parties, with the right to use the process. Two factories were put in successful operation, which were finally transferred, with all of the rights of the Vulcan Metal Refining Co., and the Vulcan Western Co. to the Vulcan Detinning Co.—the plaintiff in this case. Mr. Assman and Mr. Kern were two of the original promoters and directors of the Refining and Western companies, and Mr. Assman was so impressed with the importance of guarding the secret process that he became a depository of a copy of the formula, for the express purpose of guarding it for the mutual benefit of himself and associates. In 1901 Mr. Assman transferred his business of manufacturing tin cans to the American Can Co., the defendant, became its president, sold out his interest in the Detinning Co. to Mr. Kern, resigned his directorship therein, became the leading spirit in the installation for the Can Co. of two plants, using a detinning process similar to that of the plaintiff's, and enticed three of the former employes of the Detinning Co. to put the process in operation for the Can Co. The Detinning Co. seeks to enjoin Mr. Assman, these employes, and the Can Co. from continuing to use this secret process. The defendant contended that the plaintiff is not entitled to relief because the process was not secret; and if it was secret, the legal title to it was not in the plaintiff. The lower court on demurrer, by REED, V. C., granted a limited injunction, but on the full hearing, by BERGEN, V. C., reached the conclusion that the title to the process used by the Tinfabriek Co. was obtained by a fraud upon Mr. Goldschmidt, of which Mr. Kern had knowledge, and that when he, in 1898, became the agent of the incorporators of the plaintiff, and a director thereof, this knowledge so acquired by him would be imputed to the plaintiff; and further concluded that this would "Render the hands of the complainant unclean within the meaning of that maxim of equity" that he who comes into equity must do so with clean hands. See *Vulcan Detinning Co.* v. *American Can Co.*, 67 N. J. Eq. 243; 70 N. J. Eq. 588.

The upper court, by GARRISON, J., overruled this conclusion, saying that the imputation of the knowledge of the agent to the principal "is never a rule of evidence by which the actual possession of knowledge by the principal can, in point of fact, be established," and "in its most extreme application, affects only the legal rights of parties, and not at all their moral standing." And further, "an essential part of the presumption is that the principal is ignorant of the knowledge acquired by his agent, and if such knowledge involves a fraud the principal is innocent of such fraud," and "his conscience

is void of offence and it cannot, with any propriety, be said that his hands are unclean," for unclean hands, within the meaning of the maxim, applies to conduct which is unconscionable and morally reprehensible.

Upon the point that the process was not, in fact, secret, the court held that the gravamen of the plaintiff's charge was not that the defendant Assman was threatening to destroy the value of the secret process by imparting it to the public, but that he was making use of it in a way that was inequitable to the plaintiff, arising from a breach of trust, depending upon general principles of equity, and not upon the special doctrines by which unpatented secrets are protected. Plaintiff is entitled to have its trustee restrained from using the process against the interests of the plaintiff, because this trustee was entrusted with this process for its benefit. When Assman severed his connection with the plaintiff, and installed the process for the defendant as a competitor, it is the same in equity as if, without having severed his connection, he had broken faith with his fellows by imparting to a rival the secret he had promised to preserve. The jurisdiction of equity in such cases to restrain the trustee, is too familiar to need the citation of authorities.

But the plaintiff also contended that the defendant Can Company should be enjoined, because the knowledge of Mr. Assman should be imputed to it. The court was unable to find, as a fact, that the defendant company knew, or had actual notice, that Assman held the secret of the plaintiff's process in a confidential or trust capacity; and, therefore, the court was obliged to consider "the question as it would stand if proof of actual notice were admittedly lacking." On this point it ruled: "It is not amenable to the relief complainant now seeks, unless by force of Assman's agency, in procuring the process for it, such knowledge as he possessed is by imperative presumption to be imputed to the defendant corporation."

In determining this question, the court invoked a rule stated in an earlier case, *State* v. *Sooy,* 12 Vroom (41 N. J. L.), 394, to this effect: "The knowledge of the agent is chargeable upon his principal whenever the principal, if acting for himself, would have received notice of the matters known to the agent." And in applying this rule, the court found that if the Board of Directors of the Can Co. had undertaken to acquire "a practical knowledge of the construction and working details of such process, they must have inevitably run up against the barrier of secrecy maintained by the plaintiff." And in that case they would either have failed to obtain the secret, except with plaintiff's knowledge or consent, or have obtained it clandestinely from some one who held it in confidence under such circumstances as would have put them upon inquiry. That being so, the defendant company was held to have had the knowledge that its agent, Assman, already had. And the injunction was granted against it as well as him. In approving the rule of *State* v. *Sooy,* the court overruled the doctrine announced in *Willard* v. *Denise,* 50 N. J. Eq. 482, 35 Am. St. R. 788, that "if a corporation act through an agent (who has casually obtained information) in a matter where the information possessed by him is pertinent, the knowledge of the agent will be imputed to the principal," as a rule that afforded inadequate protection to principals generally.

Upon the point that the plaintiff did not have title, the court held that since the parties traced title to the same company (the Tinfabriek Co.), the defendant could not justify a breach of trust toward the plaintiff, because Goldschmidt might have a claim against the Tinfabriek Co. And this, too, even though there had been an assignment by Goldschmidt to the defendant before the conclusion of the case, the court applying the rule that "if a trustee purchases a title that cures or completes one that he holds in trust, the presumption in equity will be that the latter purchase was made in aid of the former trust."

The exact relations of Mr. Kern to the complainant, and of Mr. Assman to the defendant company, are not made entirely clear in the statements of facts in the reports of the case, but whatever they were, they seem to be in fact practically the same; Mr. Kern was directed by those interested to secure the process; this he did; he was one of the promoters of the complainant company, and became one of its directors, and as such participated in perfecting the purchase of the process from the party who stole it from another,—which fact he knew. Mr. Assman bore the same relation apparently to the defendant corporation,—as a promoter, director and officer. It seems strange that his knowledge should be imputed to the defendant, when similar knowledge of Mr. Kern should not be imputed to the complainant. If the court had applied the rule stated in *Willard* v. *Denise,* above, which it overruled, it would seem that the plaintiff company must have been held to have the knowledge which its agent had in the very matter entrusted to him for it.

The rule, as stated in this overruled case, seems to be according to the great weight of authority in the United States, provided the agent is sufficiently representative of the corporation. If these two men, Mr. Kern and Mr. Assman, were only directors in their respective companies, and were not particularly given authority to represent the company as a company in the matter, their knowledge would not be imputed to their respective companies in either case, according to the weight of authority. *Fairfield Savings Bank* v. *Chase,* 77 Me. 226, 39 Am. Rep. 319, with note on page 322; and *Wheeler* v. *Grand Trunk Ry. Co.,* 70 N. H. 607, 50 Atl. Rep. 103; and *Berry* v. *Rood,* 168 Mo. 316, 67 S. W. Rep. 644. If that was the situation, then the injunction against the defendant would have had to be put upon some other ground. And if plaintiff's title had been good, it might have been based upon the invalidity of the defendant's title. It seems, however, that under the rule of *State* v. *Sooy,* applied, that it was fair to say that the knowledge of Mr. Kern could not properly be imputed to the complainant, for it is quite possible that had the directors of that company undertaken to secure the process they might have done so from the Tinfabriek Co. without having ascertained the defect in its title.

The court, however, did not put the decision upon that ground, but upon the meaning of the maxim that "He who comes into equity must do so with clean hands," and insists that this is never a rule by which the actual possession of knowledge can in point of fact be established, and that it applies only to one whose conduct is in fact unconscionable and morally

reprehensible. If this is correct, it would follow that a corporation could never have unclean hands, and one might inquire what would the court have said had the defendant company brought suit to enjoin the plaintiff from longer using the process. Would it have held that the hands of the defendant were clean within the meaning of the maxim? The court cites no authority for its statement of the meaning of this maxim, in this particular, and there seems to be very little; it probably had in mind that the same rule should be applied as is sometimes said to be applied in cases of fraud charged in an action of deceit, to an innocent principal, whose agent has committed the fraudulent act. The courts of New Jersey seem to have a peculiar doctrine upon this subject, to the effect that no action for damages for "deceit" can be maintained against a principal innocent in fact, when his agent has been guilty of the fraudulent act, the agent, alone, being liable in damages, although the principal cannot retain any benefits arising from the agent's deceit. *White* v. *N. Y., etc., R. R. Co.,* 68 N. J. L. 123; *Marsh* v. *Buchan,* 1 Dick. Ch. Rep. 595, 603; *Decker* v. *Fredericks,* 18 Vroom (47 N. J. L.), 469; *Titus* v. *Cairo R. R. Co.,* 17 Vroom (46 N. J. L.), 393, 420; *Kennedy* v. *McKay,* 14 Vroom (43 N. J. L.), 288. This last case was decided partly upon a dictum of LORD CHANCELLOR CHELMSFORD, in the case of *Western Bank of Scotland* v. *Addie,* L. R. 1 Sc. App. 146, in the House of Lords, laying down the rule that corporate bodies "may be made responsible for the frauds of agents, to the extent to which they have profited by such frauds; but if, instead of seeking to set aside the contract, the person defrauded brings an action of damages for the deceit, such action cannot be maintained against the company, but only against the directors or guilty agents personally;" the court also relied upon the case of *Udell* v. *Atherton,* 7 Hurl. & Nor. 172, decided in 1861, holding the same way by an evenly divided court. And in turn, this case was to a considerable extent based upon the old case of *Cornfoot* v. *Fowke,* 6 M. & W. 358, decided in 1840, holding that the principal who had employed an agent to lease a house for him, and who had leased it to the plaintiff telling him it was all right, when the principal knew otherwise, though the agent did not, was not liable in an action of deceit, because the principal made no representation, and the agent was innocent. REDFIELD, J., in commenting upon this case, in *Fitzsimmons* v. *Joslin,* 21 Vt. 129, 52 Am. Dec. 46, says this case is "certainly a most remarkable instance of self-delusion brought about by the severity of one's own discrimination."

The rule announced by LORD CHELMSFORD has had a curious history in England. It was announced in 1867, and in the same year, and at nearly the same time, the case of *Barwick* v. *English Joint Stock Bank,* L. R. 2 Ex. 259, 12 E. R. C. 298, was decided in the Exchequer Chamber by a unanimous court, and held that the fraud of a servant or agent may be imputed to the master or principal, if the fraudulent act was done by the servant in the course of the master's business, or by the agent within the scope of the principal's authority, and for the benefit of the master or principal. In 1874 this was approved in *Mackay* v. *Commercial Bank,* L. R. 5 Priv. C. 394, and it was ruled that the "master is answerable for every such wrong of his

servant or agent as is committed in the course of the service and for his master's benefit, though no express command or privity of the master be proved; and there is no distinction between the case of fraud and the case of any other wrong. An action of deceit may be maintained against a company, whether incorporated or not incorporated, in respect of a fraud of its agent." In this case Sir MONTAGUE SMITH criticised and explained the statements of LORD CHELMSFORD and LORD CRANWORTH as dicta, and shows that LORD CRANWORTH had announced the correct rule in 1854 in *Ranger* v. *Great Western Ry. Co.*, L. R. 5 H. L. C. 86; and in 1855 in *National Exchange Bank* v. *Drew*, 2 Macq. 103. In 1880 in *Houldsworth* v. *City of Glasgow Bank*, L. R. Sc. 5 App. C. 317, it was held that one who had been defrauded by an agent in selling a chattel could sue the principal for damages, though this rule did not apply to a sale of shares in a company so long as the purchaser remained a member. In this case LORD SELBORNE says: "In equity one of the main heads of which has always been the redress of fraud, the constructive imputation of fraud to persons not really guilty of it has never been treated as a ground of relief, though the law of agency was administered according to the same rules in equity as at common law, and though in equity as well as at law the innocent principal may suffer for the fraud of the agent." And the same would be applied, whether the principal was a natural person or a corporation. In this case, however, LORD BLACKBURN favors the statement of the rule in *Barwick* v. *English Joint Stock Co. Bank*, and *Mackay* v. *Commercial Bank*. And these statements of the rule seem now to be fully established by the following decisions: *Edwards* v. *Midland Ry. Co.* [1880], 6 Q. B. D. 287. *Cornford* v. *Carlton Bank* [1899], 1 Q. B. 392, and [1900] 1 Q. B. 22 C. A., both cases of malicious prosecution; and by *Kimber* v. *Press Ass'n* [1893], 1 Q. B. 65, C. A; and *Citizens' Life Assurance Co.* v. *Brown* [1904], A. C. 423, both cases of libel. In this latter case, LORD LINDLEY holds that the intentional wrongdoing of the agent will be imputed to the principal, and he may be held liable therefor. In *Blackburn* v. *Vigors*, 17 Q. B. D., 553, 556, LORD ESHER, M.R., in speaking of the rule that "knowledge of an agent is the knowledge of his principal," said this was not intended to mean that what was known to the agent was necessarily known to the principal. * * * It was tersely descriptive, rather than strictly accurate, and that the law did not even deem that to be which was not. All that the law did was in some cases to regulate the rights and liabilities of the principal by the knowledge of his agent. * * * If an agent effected a contract for his principal by misrepresentation, fraudulent or not, the contract could not be enforced by the principal; but neither at law nor in equity could damages be recovered against the innocent principal upon an allegation of actual fraud against him. But the court held, in this case, that a policy of marine insurance was vitiated by the concealment of a material fact by a broker employed by the assured to effect an insurance, although he was not the broker through whom the insurance was ultimately effected, and although the assured was innocent of all fraud.

The view of LORD CHELMSFORD in the *Addie Case*, thus seems to be abandoned in England, as stated in 5 Eng. Cyc. of Law, p. 497. And see HAMILTON'S COMPANY LAW, p. 122; BENJAMIN'S SALES, 5th Ed., p. 481.

The New Jersey view, however, obtains in Pennsylvania and Colorado. See *Keefe et ux.* v. *Sholl,* 181 Pa. St. 90; *Freyer* v. *McCord,* 165 Pa. St. 539; *Mayo et al.* v. *Wahlgreen,* 9 Colo. App. 506. It is severely technical,—too refined to serve any good purpose. If an innocent person should ever be held in damages for the wrongful acts of his agent, there seems to be no good reason why he should be exempt from deceit or unclean hands. It would seem that the real question, both in law and equity, should be one of the agent's authority,—whether the principal put the agent to act for him,—rather than the principal's mental condition.

Mr. Mechem states the rule that "The principal is liable for the fraudulent representation made in the course of the agent's employment within the apparent scope of his authority in reference to the subject matter of the agency." MECHEM ON AGENCY, § 743. To same effect is 1 AM. & ENG. ENC. OF LAW, 2d ed. 1159, with many citations. Further, if the requisite intention to make an assault or libel, or malicious prosecution, or to allow a recovery for exemplary damages, can be imputed to an innocent principal who has put an agent in his place to do his work, and who does it in this improper manner, such similar knowledge and intention could be so imputed to such a principal, as to render his hands unclean when he comes into a court of equity seeking relief. The New Jersey courts were among the earliest in this country to hold that a corporation is liable for an assault and battery by an agent, if the act was done in accomplishing the purpose of his employers, *Brokaw* v. *N. J. R. R. Co.,* 3 Vroom (32 N. J. L.), 328, 90 Am. Dec. 659, decided in 1867; the same year it was held that a corporation is liable for malicious prosecution, though it must appear to be instituted maliciously and without probable cause, that is, done wilfully, *Vance* v. *Erie Ry. Co.,* 3 Vroom (32 N. J. L.), 339, 90 Am. Dec. 665; in 1882 it was held that a corporation is liable for libel, *Evening Journal Ass'n* v. *McDermott,* 15 Vroom (44 N. J. L.), 430, 43 Am. R. 392; and, lately, that a corporation may be liable in exemplary damages for libel. *Hoboken Printing & Pub. Co.* v. *Kahn* (1896), 59 N. J. L. 218, 59 Am. St. R. 585. All of these cases are in accord with the weight of authority throughout the country; and though in some of them the intentional wrong-doing was that of the board of directors or the managing officers, there does not seem to be any good reason for holding that their intentional wrong-doing shall be imputed to the company any more than the intentional wrong-doing of any one of their agents in carrying on a matter entrusted to him. See note 101 Am. St. R. 730. If such motives in a matter undertaken by an agent can, in these cases, be imputed to an innocent principal, there seems to be very little reason why a like motive should not be imputed to the principal when he seeks equitable relief against another.

This maxim perhaps is best expressed by saying: "He that hath done iniquity shall not have equity." It is not designed to protect the wrong-doing defendant by leaving him in possession of what he has already acquired from a wrong-doing plaintiff, but is a maxim of policy based on the idea that courts of equity do not sit to aid those who have themselves been guilty of wrong-doing. As, for instance, JESSEL, M. R., says in *Sykes* v. *Beadon,* 11 Ch. D. 170, "If two persons go partners as smugglers, can one maintain a bill

against the other to have an account of the smuggling transaction?" So, too, a court of equity will not make a defendant clean up his hog pen when plaintiff's hogs are on his own premises just across the alley "in manure up to their knees," *Cassady* v. *Cavenor* (1873), 37 Ia. 300; nor has a member of an illegal combination of coal dealers clean enough hands to enjoin a city from engaging in the coal business without authority, *Baker* v. *City of Grand Rapids* (1906), 142 Mich. 687, 106 N. W. 209. One literary pirate is not entitled to the protection of a court of equity against another sinning in the same way, *Edward Thompson Co.* v. *Am. L. B. Co.* (1903), 122 Fed. 922; see, also, *Manhattan Medicine Co.* v. *Wood* (1882), 108 U. S. 218; *Medford* v. *Levy* (1888), 31 W. Va. 649, 31 Am. St. R. 887; *Hilson Co.* v. *Foster* (1897), 80 Fed. R. 896 *Nebraska Tel. Co.* v. *Western Ind. Tel. Co.* (1903), 68 Neb. 772, 95 N. W. 18; *Woodson* v. *Hopkins* (1905), 85 Miss. 171, 37 So. 1000; *Toledo Computing Scale Co.* v. *Computing Scale Co.* (1906), 142 Fed. R. 919. Compare, however, *Sharp* v. *Taylor,* 2 Phil. Ch. 801; *Dering* v. *Earl of Winchelsea,* 1 Cox 318, 21 E. R. C. 617; *Foster* v. *Winchester,* 92 Ala. 497. Courts, however, will hear a plaintiff who has repented of his former iniquity, washed his hands, and will give relief against the future illegal acts of his competitors, *Employing Printers' Club* v. *Doctor Blosser Co.* (1905), 122 Ga. 509, 50 S. E. 353.

It has sometimes been said that this maxim is a principle running through the law, and has prevented a murderer from becoming the heir, devisee, or beneficiary of the one he murders,—*Riggs* v. *Palmer,* 115 N. Y. 506; *N. Y. Mut. L. Ins. Co.,* 117 U. S. 591; the weight of authority, however, seems to be the other way, except in insurance cases. *Owens* v. *Owens,* 100 N. C. 240; *Shellenbarger* v. *Ransome,* 41 Neb. 631, 25 L. R. A. 564; *McAllister* v. *Fair,* 72 Kans. 533, 115 Am. St. R. 233. H. L. W.

THE KANSAS-COLORADO WATER CASE.—The law recognizes two directly opposed rules governing the rights which may be acquired in flowing waters. The familiar common law rule of riparian rights, supported by a long line of uniform decisions, allows the use but not the consumption of the waters of a stream; the doctrine of prior appropriation gives to the first appropriator the right to enjoy a continuance of such appropriation.

The latter doctrine arose in California, shortly after the discovery of gold, from the necessities of the existing conditions. There being no law applicable to the new conditions, the miners held meetings and adopted regulations, by which they agreed to be bound; and since large quantities of running water were essential to the operation of the placer mines, it soon became settled that the right to divert a definite quantity of water from rivers could be acquired by prior appropriation. GOULD, WATERS, § 228, 17 AM. & ENG. ENC. OF LAW, 494.

The aridity of vast tracts of land necessitated extensive irrigation in order that such land might be cultivated, and as a natural consequence, the doctrine of prior appropriation was soon extended to irrigation. This rule, evolved by custom, was made available against the general government by Act of